Supreme Court, U.S.
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Docket No. 91-7873

IN THE UNITED STATES SUPREME COURT

October Term, 1992

WILLIAM FEX,

Petitioner,

v

STATE OF MICHIGAN,

Respondent.

ON WRIT OF CERTIORARI
TO THE MICHIGAN SUPREME COURT

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QUESTIONS PRESENTED FOR REVIEW

I.

WHETHER THE INTERSTATE AGREEMENT ON DETAINERS' 180 DAY PERIOD BEGINS TO RUN WHEN THE PROSECUTOR RECEIVES THE INMATE'S REQUEST OR EARLIER.

II.

WHETHER PETITIONER IS ENTITLED TO A TOTAL DISCHARGE FOR AN ALLEGED III(c) VIOLATION WHERE HE HAS NOT SHOWN (1) THAT THE FORMS WERE IN FACT NOT "PROMPTLY" DELIVERED TO HIM, (2) WHY THE FORMS WERE NOT DELIVERED EARLIER, AND (3) ANY PREJUDICE.

TABLE OF CONTENTS

QUESTION PRESENTED FOR REVIEW..... 1

TABLE OF CONTENTS..... 2

TABLE OF AUTHORITIES..... 3-7

CITATION OF THE OPINIONS AND JUDGMENTS DELIVERED IN THE COURTS BELOW..... 8

STATEMENT OF THE CASE..... 9-14

ARGUMENT I 15-42

ARGUMENT II 43-56

RELIEF REQUESTED..... 57

TABLE OF AUTHORITIES

Barker v. Wingo, 407 U.S. 514 (1972)..... 54

Beebe v. Vaughn, 430 F.Supp. 1220 (D. Del 1977)..... 25

Browning v. Foltz, 837 F.2d 276 (6th Cir. 1988), cert. denied 488 U.S. 1018 (1989)..... 25

Burns v. State, 578 S.W.2d 650 (Tenn.Crim.App. 1978)..... 28

Carchman v. Nash, 473 U.S. 716 (1985)..... 16,17,34,41

Casper v. Ryan, 822 F.2d 1283 (3rd Cir. 1987), cert. denied 484 U.S. 1012 (1988)..... 25

Coit v. State, 440 So.2d 409 (Fla.App. 1983)..... 53

Commonwealth v. Fisher, 451 Pa. 102, 301 A.2d 605 (1973)..... 26

Commonwealth v. Gonce, 320 Pa. Super. 19, 466 A.2d 1039 (1983)... 47,48,49

Commonwealth v. Martens, 398 Mass. 674, 500 N.E.2d 282 (1986), cert. denied 481 U.S. 1041 (1987)..... 26,27

Cuyler v. Adams, 449 U.S. 433 (1981)..... 50

Gibson v. Klevenhagen, 777 F.2d 1056 (5th Cir. 1985)..... 30

Hines v. State, 58 Md.App. 637, 473 A.2d 1335 (1984)..... 25

Holland v. State, 265 Ind. 216, 352 N.E.2d 752 (1976)..... 25,30

McCallum v. State, 407 So.2d 865 (Ala.Crim.App. 1981)..... 32

People v. Bielecki, 41 Colo.App. 256, 588 P.2d 377 (1978)..... 25

People v. Bowman, 439 Mich.995, ___ N.W.2d ___ (1972)..... 41

People v. Dailey, 46 Ill.App.3d 195, 4 Ill.Dec. 756, 360 N.E.2d 1131 (1977)..... 32

People v. Fex, 439 Mich 117, 479 N.W.2d 625 (1992), cert. granted. ___ U.S. ___, 118 L.Ed.2d 542 (1992)..... 33,34

People v. Higginbotham, 712 P.2d 993 (Colo. 1986)..... 53

People v. Masselli, 17 App.Div. 2d 367, 234 N.Y.S.2d 929 (1962).... 30

People v. Vrlaku, 73 N.Y.2d 800, 537 N.Y.S.2d 24, 533 N.E.2d 1053 (1988)..... 26,30

People v. Wilson, 69 Cal.App.3d 631, 138 Cal.Rptr. 259 (1977)..... 25

Pittman v. State, 301 A.2d 509 (Del. 1973)..... 28,29

Rockmore v. State, 21 Ariz.App. 388, 519 P.2d 877 (1974)..... 29

Romans v. District Court, 633 P.2d 477 (Colo. 1981)..... 53

Saffold v. State, 521 So.2d 1368 (Ala.Crim.App. 1987)..... 25

Schin v. State, 744 S.W.2d 370, (Tex.App. 1988)..... 49,50

Seymore v. Alabama, 846 F.2d 1355 (11th Cir. 1988)..... 44

Spears v. State, 280 Ark. 577, 660 S.W.2d 913 (1983)..... 25

State v. Arwood, 460 Or.App. 653, 612 P.2d 763 (1980)..... 26

State v. Barefield, 110 Wash.2d 728, 756 P.2d 731 (1988)..... 53

State v. Braswell, 194 Conn. 297, 481 A.2d 413 (1984), cert. denied 469 U.S. 1112 (1985)..... 20,21

State v. Clark, 222 Kan. 65, 563, P.2d 1028 (1977)..... 49,50

State v. Default, 540 A.2d 355 (R.I. 1988)..... 26

State v. Ferguson, 41 Ohio App.3d 306, 535 N.E.2d 708 (1987)..... 31

State v. Grant, 227 Mont. 181, 738 P.2d 106 (1987)..... 26

State v. Herring, 210 Conn. 78, 554 A.2d 686 (1989), cert. denied 492 U.S. 912 (1989)..... 53,54

State v. Lippolis, 101 N.J.Super. 435, 244 A.2d 531 (1968),affd. 107 N.J.Super.137, 257 A.2d 705 (1969), revd. on other grounds, 55 N.J. 354, 262 A.2d 203 (1970)..... 31

State v. Minnick, 413 So.2d 168 (Fla.App. 1982)..... 25

State v. Moore, 774 S.W.2d 590 (Tenn. 1989)..... 26,28,32,34

State v. Reitz, 26 Ohio App.3d 1, 26 Ohio Br. 168, 498 N.W.2d 163 (1984)..... 25,31

State v. Reynolds, 218 Neb. 753, 359 N.W.2d 93 (1984)..... 50,51,52

State v. Smith, 686 S.W.2d 543 (Mo.App. 1985)..... 53

State v. Ternaku, 156 N.J.Super. 30, 383 A.2d 437 (1978), certif. denied 77 N.J.479, 391 A.2d 494 (1978)..... 22,23,24,31,33

State v. Walton, 734 S.W.2d 502 (Mo. 1987)..... 25,26

State v. Wells, 186 N.J.Super. 497, 453 A.2d 236 (1982)..... 32,33

State v. White, 234 Kan. 340, 673 P.2d 1106 (1983)..... 25

Thompson v. State, 186 Ga.App. 379, 367 S.E.2d 247 (1988)..... 25

United States v. Glasgow, 790 F.2d 446 (6th Cir. 1985), cert. denied 475 U.S. 1124 (1986)..... 45

United States v. Mauro, 436 U.S. 340 (1978)..... 20,44

United States v. Nesbitt, 852 F.2d 1502 (7th Cir. 1988), cert. denied 419 F.2d 1015 (1989)... 24,25

United States v. Reed, 910 F.2d 621 (9th Cir. 1990)..... 31

United States v. Ricketson, 498 F.2d 367 (7th Cir. 1974), cert. denied 419 U.S. 965 (1974)... 25

Ward v. State, 435 N.E.2d 578 (Ind.App. 1982)..... 29

Williams v. State, 533 N.E.2d 1193 (Ind. 1989)..... 56

Wisconsin Public Intervenor v. Mortier, 501 U.S.____, 111 S.Ct. 2476 (1991)..... 20

Young v. Mabry, 471 F.Supp. 553 (E.D.Ark. 1979), affd. 596 F.2d 339 (8th Cir. 1979), cert. denied 444 U.S. 852 (1979)..... 21,22

Mich. Comp. Laws 767.91, et. seq... 39

Anno: Validity, Construction, and Application of Interstate Agreement on Detainers, 98 A.L.R.3d 160..... 26

3 U.S. Code Congressional & Administrative News..... 17,18,19,34

Slade, Fundamentals of Detainers, paper presented at the 28th Annual Conference of National Association of Extradition Officials (1992).... 35,36

CITATION OF THE OPINIONS AND JUDGMENTS DELIVERED IN THE COURTS BELOW

People v. Fex, 439 Mich. 117, 479 N.W.2d 625 (1992), cert. granted ___ U.S. ___, 118 L.Ed.2d 542 (1992).

People v. Fex, Michigan Court of Appeals docket number 119192, released 06/21/91.

People v. Fex, Jackson County Circuit Court file number 88-49555-FC, released 03/23/89.

STATEMENT OF THE CASE

On March 23, 1989, petitioner was convicted by a jury of armed robbery, Mich. Comp. Laws sec. 750.52, and felony firearm, Mich. Comp. Laws sec. 750.227b. Subsequently, on April 20, 1989, Jackson County Circuit Court Judge Gordon Britten sentenced him to consecutive terms of 2 and 5 to 20 years imprisonment (concurrent to the sentence that he was serving in Indiana). On June 21, 1991, however, the Michigan Court of Appeals reversed the conviction and ordered the charges dismissed. Then, on January 9, 1992, the Michigan Supreme Court summarily reversed the Michigan Court of Appeals' decision and reinstated the conviction. 439 Mich. 117, 479 N.W.2d 625 (1992). This Court granted certiorari on May 18, 1992. ___ U.S. ___, 118 L.Ed.2d 542 (1992).

On December 8, 1987, between 1:00 and 1:30 a.m., petitioner robbed a Rax restaurant in Jackson with a shotgun. (Trial Transcript [Tr], pp. 48-49, 53-54).

He took between $350.00 and $450.00. (Tr, p. 60).

Petitioner eventually was convicted on unrelated charges in Indiana. He eventually was transferred to the Westville Correctional Facility in Michigan City, Indiana, to serve the time. Michigan placed a detainer with that facility against him for the charge in the present case. On September 7, 1988, petitioner requested, pursuant to the Interstate Agreement on Detainers, Article III, that the untried charge (in the present case) be disposed of. Respondent received the paperwork from the Indiana warden on September 26, 1988.

About ten days before trial started, petitioner filed a motion to dismiss claiming that the Interstate Agreement on Detainers had been violated. He argued that both Articles III and IV applied. He claimed that he should have been tried within 180 days of September 22, 1988, the day that his request for final disposition

was mailed by the prison to respondent. He also argued that the 180 day period should have started earlier claiming that he could have been informed of his rights earlier. (Tr, p. 5). He also argued that he should have been tried within 120 days of October 26, 1988, the date that he was physically returned to Michigan. The parties argued the motion on March 22, 1989, the first day of trial. In denying the motion to dismiss, Judge Britten first ruled that the 120 day rule was not violated because Article IV does not apply because respondent had not initiated the extradition. (Tr, pp. 11-12). He then stated:

> The Court is quite satisfied that the time is triggered by receipt of the notice by the prosecutor otherwise you'd have no way of knowing that the matter was in process and he could be denying the People of their rights to

prosecution without ever being aware that the matter was received, so it makes sense to us that date to start our time running here leaves 182 [sic] days court file reflects to today. We have a delay of seven days because the transcript would not be ready for the arraignment in Circuit Court and that seven-day delay was not the fault of the prosecutor nor the defendant but because the reporter was not able to get the transcript out in one week so that was a seven-day delay there which would take away from 182 [sic] and leave us with 175 [sic] days.

* * *

I see my first mistake. I started off with nine days in September and that would not be correct. It's an error. We're under 177 days to today. Thank you. (Tr, pp. 12-13).

The Michigan Court of Appeals, however, on June 21, 1991, disagreed:

> Michigan case law is clear and the commencement of the 180-day statutory period was triggered by the defendant's request for final disposition to the prison officials in this case. People v Malone, 177 Mich App 393, 399; 442 NW2d 658 (1989); People v Marshall, 170 Mich App 269, 276-277; 428 NW2d 39 (1988). Since the charges against defendant were not brought to trial within the requisite 180-days, and noting that no exceptions to the statutory requirement are claimed, dismissal of the charges against defendant is mandated. People v Joseph Bowman, ___ Mich App ___; ___ NW2d ___ (Docket No. 69453, decided May 7, 1991, 9:35 a.m.).

Then, however, on January 9, 1992, the Michigan Supreme Court summarily reversed the Michigan Court of Appeals' judgment and reinstated the conviction:

> In light of all these considerations, we are persuaded that the majority rule should be adopted in Michigan. We thus conclude that the Court of Appeals erred when it found that the defendant was not tried within the 180 day period stated in Article III(a) of the IAD. 439 Mich. 123-124.

It also summarily rejected petitioner's other arguments in a footnote. 439 Mich. 124, fn. 8. Five Justices signed the majority opinion. The two Justices who dissented did so claiming: "Peremptory disposition is not appropriate." 439 Mich. 124. They took no position on the substantive issues.

ARGUMENT

I.

BECAUSE PETITIONER WENT TO TRIAL WITHIN 180 DAYS AFTER RESPONDENT RECEIVED HIS REQUEST UNDER THE INTERSTATE AGREEMENT ON DETAINERS, HIS CONVICTION SHOULD NOT BE DISMISSED.

The Michigan Supreme Court correctly analyzed the issues and properly rejected each of petitioner's arguments. In the present case, Article III's 180 day period began on September 26, 1988, when respondent received petitioner's request for speedy disposition. This Court has already said so, the Congressional history says so also, and, despite petitioner's assertions to the contrary, the vast majority of jurisdictions in the country say so too. As it is, ruling that the 180 day period begins when the prosecutor receives the request will make the system

more efficient than otherwise. The receiving state will be able to immediately calculate precisely when trial should begin and will not be penalized (1) should the sending state omit certain documents and/or (2) delay sending the papers to the prosecutor. 180 days is just not that much time to ready a case for trial as it is. The amount of time it takes for a request to work its way through a prison's bureaucracy should not lie on the government.

To a certain extent, this case is directly controlled by this Court's language in Carchman v. Nash, 473 U.S. 716, 721 (1985), where this Court stated that the period in fact starts when the prosecutor receives the request:

> Specifically, Article III requires the warden to inform the prisoner that a detainer has been lodged against him and that he may request final disposition of the

> indictment, information, or complaints upon which the detainer is based. If the prisoner makes such a request, the warden must forward it, along with a certificate providing certain information about the prisoner's terms of confinement, to the appropriate prosecuting official and court of the receiving State. The authorities in the receiving State then must bring the prisoner to trial within 180 days absent good cause shown or the court must dismiss the indictment, information, or complaint with prejudice and the detainer will cease to be of any force or effect. (Emphasis added.)

This language in Carchman is completely consistent with the legislative history. Senate Report No. 91-1356, 91st Congress, 2d Session, 3 U.S. Code

Congressional & Administrative News, p. 4865 (1970), states:

> Under the agreement, prison authorities are required to inform prisoners of all indictments, informations, or complaints on the basis of which detainers have been lodged against them by other jurisdictions. Prisoners may then request trial on such pending charges. Any request is transmitted through the warden to the proper official in the other jurisdiction <u>who then has 180 days to bring the prisoner to trial</u>.
>
> (Emphasis added.)

This conclusion is further buttressed by the Deputy Attorney General's letter to Congress concerning the IAD which is found on page 4868 of the same Congressional Administrative News Report:

> Article III of the Agreement provides that the inmate may make

> a request for the disposition of all pending charges upon which detainers are based by applying to the officials in whose custody he is placed, and that application will be forwarded to authorities of the jurisdiction in which charges are pending. The person must be brought to trial within 180 days thereafter.

Petitioner, on the other hand, has not in any way claimed that either <u>Carchman</u> or the Congressional history do anything but support respondent. He completely ignores them. As it is, although Michigan Supreme Court Charles Levin's comment that committee reports' integrity have been challenged may be correct in certain instances, no one has in any way challenged the integrity of the reports that respondent and the Michigan Supreme Court have relied on. Further, this Court itself

has relied on such reports. In Wisconsin Public Intervenor v. Mortier, 501 U.S. ___, 111 S. Ct. 2476 (1991), eight Justices of this Court relied on reports (from the same year, 1971, that respondent is relying on) to interpret a legislative act. In addition, in United States v. Mauro, 436 U.S. 340, 355, fn. 22 (1978), this Court itself relief on this very Committee Report in interpreting the IAD.

Next, despite petitioner's erroneous statement to the contrary, the vast majority of jurisdictions in this country have interpreted the 180 day period of Article III of the IAD as starting when the prosecutor received the request and not when the defendant makes the request. In State v. Braswell, 194 Conn. 297, 481 A.2d 413, 417 (1984), cert. denied 469 U.S. 1112 (1985), the Connecticut Supreme Court ruled:

> Given the IAD's use of the word "sent" in subsection (b), we must

> presume that its use of the word "delivered" in subsection (a) signifies its recognition of different meanings commonly attributed to each word. . . . It follows that had the IAD intended the 180 day disposition period to commence when the prisoner placed his or her request with the custodial officials, subsection (a) like subsection (b), would refer to the date on which the prisoner causes the request to be sent, rather than the day on which it was caused to be delivered.

Further, as stated in Young v. Mabry, 471 F.Supp. 553, 561 (E.D.Ark. 1979), affd. 596 F.2d 339 (8th Cir. 1979), cert. denied 444 U.S. 853 (1979):

> The Court is satisfied that the plain language of Article III . . . . leads to the conclusion

that the date of the receipt of notice by the prosecuting authorities triggers the statutory period. The key word in the statutory language is "delivered" and comporting with the purpose of the notice provision, the term would have little meaning if something other than the receipt of the notice were contemplated.

Likewise, as ruled by the New Jersey Superior Court, Appellate Division, in State v. Ternaku, 156 N.J.Super. 30, 383 A.2d 437, 439 (1978), certif. denied 77 N.J. 479, 391 A.2d 494 (1978):

> The language of the statute is explicit. It provides for the commencement of the 180-day period when defendant has "caused to be delivered to the prosecuting officer and the appropriate court" the written notice and request for

final disposition of the pending indictment. The Legislature clearly intended that the documents be delivered to the prosecutor and the appropriate court before the 180-day period starts to run. The period does not start to run upon mere execution and delivery of the notice and request to the warden, commissioner of corrections or other official, having custody of defendant. In our view it would be contrary to the public interest to start the running of the 180-day period prior to actual receipt of the notice and request by the prosecutor and the court. If we were to interpret the statute as defendant requests, an indictment would be subject to dismissal each time delivery of

the documents to the prosecutor and court is delayed, regardless of cause. We cannot conceive our Legislature as intending such a result by enacting the Interstate Agreement on Detainers. As a matter of fact, if the Legislature intended the 180-day period to begin from the time a defendant delivers the notice to the warden, commissioner of corrections or other official having custody over him, it would have so signified by appropriate language.

Many other cases as well have ruled (or at least have stated) that the trigger date for the 180-day period is the date that the prosecutor receives the request from the warden and not the date that the inmate gives the request to the warden. Among these cases are: United States v. Nesbitt, 852 F.2d 1502, 1516 (7th Cir.

1988), cert. denied 488 U.S. 1015 (1989); Casper v. Ryan, 822 F.2d 1283, 1291 (3rd Cir. 1987), cert. denied 484 U.S. 1012 (1988); Browning v. Foltz, 837 F.2d 276, 283 (6th Cir. 1988), cert. denied 488 US 1018 (1989); United States v. Ricketson, 498 F.2d 367 (7th Cir. 1974), cert. denied 419 U.S. 965 (1974); Beebe v. Vaughn, 430 F. Supp. 1220 (D.Del. 1977); Saffold v. State, 521 So.2d 1368, 1370 (Ala.Crim.App. 1987); Spears v. State, 280 Ark. 577, 660 S.W.2d 913 (1983); People v. Wilson, 69 Cal.App.3d 631, 138 Cal.Rptr. 259 (1977); People v. Bielecki, 41 Colo.App. 256, 588 P.2d 377, 378 (1978); State v. Minnick, 413 So.2d 168, 169 (Fla.App. 1982); Thompson v. State, 186 Ga.App. 379, 367 S.E.2d 247, 249 (1988); Holland v. State, 265 Ind. 216, 352 N.E.2d 752, 757 (1976); State v. White, 234 Kan. 340, 673 P.2d 1106, 1110 (1983); Hines v. State, 58 Md.App. 637, 473 A.2d 1335, 1341 (1984); State v. Walton, 734

S.W.2d 502, 504 (Mo. 1987); State v. Grant, 227 Mont. 181, 738 P.2d 106, 110 (1987); People v. Vrlaku, 73 N.Y.2d 800, 537 N.Y.S.2d 24, 533 N.E.2d 1053, 1054 (1988); State v. Reitz, 26 Ohio App.3d 1, 26 Ohio Br. 168, 498 N.E.2d 163, 164 (1984); State v. Arwood, 46 Or. App. 653, 612 P.2d 763, 764 (1980); Commonwealth v. Fisher, 451 Pa. 102, 301 A.2d 605, 606 (1973); State v. Default, 540 A.2d 355, 356 (R.I. 1988); State v. Moore, 774 S.W.2d 590, 595 (Tenn. 1989).

These cases in fact constitute the majority view. Anno: Validity, Construction, and Application of Interstate Agreement on Detainers, 98 A.L.R.3d 160, 208. Petitioner's erroneous claim to the contrary that his position is the majority rests on an overly broad statement in one case. Dealing with a different issue, Commonwealth v. Martens, 398 Mass. 674, 500 N.E.2d 282, 284 (1986), cert. denied 481 U.S. 1041 (1987), stated:

> The Commonwealth correctly concedes that the 180-day period commences when a defendant files his request with the correctional authorities in the sending State, and not when those authorities forwarded the request to the receiving State. Although we have not had occasion to consider the question, we agree with the majority of jurisdictions that have addressed the issue that a prisoner need only transmit the written notice and request for final disposition to the appropriate custodial officials in order to fulfil completely his responsibility under the agreement.

Martens was not dealing with the issue presented in the present case. Instead, it was dealing with what an inmate needed to

do to trigger Article III. In fact, the above quoted language is dicta because the Massachusetts Supreme Judicial Court in the end ruled that the defendant was entitled to no relief at all because he had not even invoked Article III.

In addition, very few of the cases that petitioner cites actually support him on this point. Although Burns v. State, 578 S.W.2d 650 (Tenn.Crim.App. 1978), does, it was actually explicitly overruled on point by Moore, supra, 774 S.W.2d 594. Moore is the case that the Michigan Supreme Court relied on very heavily for its conclusion that the majority supports respondent.

Pittman v. State, 301 A.2d 509 (Del. 1973), does not support petitioner either. In that case, the prosecutor did not try to even extradite the defendant within the requisite 180 days. Both Maryland and Delaware failed to comply with the Act. As

it is, if anything, Pittman supports respondent, not petitioner. In Pittman, the Delaware Supreme Court specifically stated: "In such a case, the State must respond and bring the prisoner to trial within 180 days after written notice is delivered to the prosecutor's office." 301 A.2d 512. At no time did it ever state that the 180 period begins on the day that the prisoner delivers his request to the warden.

Next, Rockmore v. State, 21 Ariz.App. 388, 519 P.2d 877 (1974), does not support petitioner either. It did not address this issue. In Rockmore, the trial had not started within 180 days of either of the two relevant starting dates. The issue decided was whether or not the appropriate certificates had been sent to the prosecutor thus triggering the Act.

Although Ward v. State, 435 N.E.2d 578 (Ind.App. 1982), although ambiguous, can be

read to support petitioner, if it in fact supports petitioner, it directly contradicts Holland, supra. The Indiana Supreme Court has never retreated from Holland. Its decisions have more persuasive authority than do the decisions of the Indiana Court of Appeals.

Gibson v. Klevenhagen, 777 F.2d 1056 (5th Cir. 1985), does not support petitioner. No where in Gibson did the Fifth Circuit even state (let alone decide) when the 180 day period begins.

People v. Masselli, 17 App.Div.2d 367, 234 N.Y.S.2d 929 (1962), next, does not support petitioner. Unlike what happened in the present case, in Masselli, the documents were never forwarded on to the prosecutor. In the present case, they were forwarded on only 15 days later. In any event, even if Masselli can be read to support petitioner, it was eventually overruled in the New York Court of Appeals' unanimous decision in Vrlaku, supra.

Next, State v. Ferguson, 41 Ohio App.3d 306, 535 N.E.2d 708 (1987), does not even address this issue either. In Ferguson, the years delay occurred because the papers had been mismailed. This issue did not even arise. In any event, the court did not disagree with its earlier decision in Reitz, supra.

Next, State v. Lippolis, 101 N.J.Super. 435, 244 A.2d 531 (1968), affd. 107 N.J.Super. 137, 257 A.2d 705 (1969), revd. on other grounds, 55 N.J. 354, 262 A.2d 203 (1970), did not deal with this issue but instead with tolling provisions and extending the 180 day period for good cause. It was even mentioned in Ternaku, supra, 383 A.2d 439.

Last, United States v. Reed, 910 F.2d 621 (9th Cir. 1990), does not help petitioner either. Reed did not decide when the 180 day period starts. Instead, it ruled as it did because the defendant

had been misled by a deputy and had not been given the correct form.

In fact, even some of the cases listed in the Michigan Supreme Court's opinion in the present case and in Moore as supporting petitioner actually do not. McCallum v. State, 407 So.2d 865 (Ala.Crim. 1981) did not even decide the issue. It did not even find a 180 day rule violation. It ruled that the defendant had not even triggered Article III.

Next, People v. Dailey, 46 Ill.App.3d 195, 4 Ill.Dec. 756, 360 N.E.2d 1131 (1977), did not rule in petitioner's favor either. It reversed the lower court and reinstated the indictment against the defendant. It ruled that the defendant's earlier letter had not complied with the Act and thus did not invoke it. Therefore, any language supporting petitioner is, at best, dicta.

Last, State v. Wells, 186 N.J.Super. 497, 453 A.2d 236 (1982), does not support

petitioner either. Wells deal with a different issue, a violation of subsection (b), the prison's failure to send the inmate's request to the prosecutor. In fact, Wells specifically stated that it was not at all contradicting Ternaku. 453 A.2d 238. As noted above, Ternaku directly supports respondent.

As it is, the one case that definitely did support petitioner, the Michigan Court of Appeals' unpublished opinion in the present case, did not even use any analysis in arriving at its decision. It not only completely ignored the Act's Legislative history, but it ignored the vast majority of the cases.

The Michigan Supreme Court on the other hand, noted each of these points in summarily rejecting petitioner's claims. It first looked at the actual language of the statute itself:

> In Article III(b), the IAD states a prisoner's duty to give or send

the request to the prison authorities who are holding him. Similar language, which would indicate that the 180-day period runs from the date the request is given or sent to prison authorities, could easily have been employed in Article III(a), if the drafters had been so inclined. Instead, the period runs from the time when the prisoner has caused delivery, which is actual receipt. 439 Mich. 120.

Then, it quoted from this Court's language in Carchman, supra, 473 U.S. 721. 439 Mich. 120. Then, it quoted from the United States Senate Judiciary Committee's report. 439 Mich. 121. Last, it quoted Moore, supra, 774 S.W.2d 595, in noting that the vast majority of jurisdictions have interpreted the IAD this way. 439 Mich. 121-122.

The Michigan Supreme Court even stated:

> An obvious purpose of an interstate agreement is to achieve a uniform body of law in the jurisdictions that have enacted the agreement. Absent sound reasons to the contrary, it is therefore sensible to interpret such an agreement in the same manner as a majority of other jurisdictions. 439 Mich. 121, fn. 5.

This analysis makes sense. The majority rule is so strongly accepted across this country that the paper presented by David Slade of the Department of Corrections in Massachusetts at the National Association of Extradition Officials held June 7-10, 1992, in Portland, Maine, has the following statement on page 6 in both bold face and italics: "The prisoner must be brought to

trial within 180 days of the time the prosecutor received the prisoner's request for disposition and accompanying documents. . . ." Changing (in effect) the law now would jeopardize numerous prosecutions which have relied on the majority rule. Petitioner should have to present better reasons than he has to have this Court change the way that this Act has been almost universally interpreted.

Other, more substantial, reasons exist as well why both the Michigan Supreme Court and Jackson County Circuit Court Judge Gordon Britten correctly ruled that subsection (a)'s 180 day rule should begin when the prosecutor receives the request rather than when the inmate delivers the request to the warden. Processing the request takes time. 180 days is not that long in the first place, especially if the case is complicated. The prison sending the inmate's request to the prosecutor is

not as easy as it sounds. It must do a number of things, by statute, once it receives an inmate's request. It must make up a certificate which tells the requesting prosecutor the terms of the inmate's present commitment, the time that he has served, the time that he has left remaining, the amount of good time, his parole eligibility, and the State's decisions on parole. He must then send to the prosecutor a written notice and a certificate. In addition, petitioner was not the only inmate in the Indiana Westville Correctional Facility at the time. Prison officials have more duties than merely forwarding prisoner requests. The prison sending respondent the forms within only 15 days is actually surprising. As anyone in government knows, bureaucratic delays exist, especially during this era of budget cutbacks. Forwarding the request could very easily have taken a few months.

Further, IAD cases are special. One does not merely walk over to a prison in another State and announcing an intention to pick up this inmate. Procedures must be complied with and forms filled out. These procedures take time. IAD forms VI and VII must be filled out before an inmate may be picked up. These forms require signatures from 1) a local judge, 2) the prosecutor, 3) the person who will transport the prisoner, and 4) the receiving State's IAD Administrator. Because not each of these people work in the same city, the forms must be sent through the mail a number of times. The Administrator will not sign the form until the transportation person has signed. The transportation person will not sign until he has arranged a date with the prison for the pickup. These seemingly simple tasks take time. Weeks or months (all countable against the prosecution) can go by before the defendant is even returned to the receiving State.

Then, if the case is complicated or involves numerous witnesses, 180 days (especially with docket congestion) is just not that long. Although the present case was not complicated and did not involve numerous witnesses, it did have an unusual aspect which took time. Respondent's star witness, Susan Alexander, was herself an inmate in another Indiana prison at the time. Hence, respondent had to bring her in pursuant to the Uniform Act to Secure the Attendance of Witnesses from within the State in Criminal Proceedings. Mich. Comp. Laws sec. 767.91, et seq. This procedure, of course, took time. Once again, one does not just walk up to another State's prison announcing an intention to take away an inmate.

In addition, having the 180 day rule begin when the inmate delivers his request to the warden makes matters too uncertain. Because IAD cases are not the only cases on

court's dockets, the courts will schedule them with an eye toward a deadline. If they do not know the deadline, however, scheduling can become very difficult. The prosecutor will not necessarily receive anything specifically mentioning the exact date when the inmate delivered his request to the warden. In other words, petitioner's position allows for too many pitfalls. Too many things can go wrong which would mandate dismissing the criminal charges.[1]

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[1]In fact, conceivably, the inmate could backdate his request on the hope that the prison bureaucracy will not notice the discrepancy. On the other hand, as long as the requests are sent by certified mail, as in the present case, prosecutors will not be able to fraudulently change the date when they received the request.

Petitioner's argument that "there would be neither a legal nor a practical limit on the length of time prison authorities could delay forwarding a REQUEST FOR DISPOSITION under the IAD," is wrong. Such a problem would be a violation of subsection (b), something that did not occur in the present case. Instead, subsection (a) is at issue. As it is, in the present case, the Michigan Supreme Court specifically declined to address this issue. 439 Mich. 123, fn. 6. As it is, it has subsequently granted leave to appeal in a case to specifically address it. People v. Bowman, 439 Mich. 995, ___ N.W.2d ___ (1992).

All in all, the Michigan Supreme Court and Judge Britten were right. Not only does the Legislative history support this decision, but the vast majority of jurisdictions and this Court's own language in Carchman supports it as well. Further,

starting the 180 day period when the prosecutor received the request is more efficient. It will better promote the Act's purposes without unnecessarily requiring numerous criminal convictions or charges to be dismissed.

ARGUMENT

II.

BECAUSE PETITIONER HAS NOT SHOWN (1) THAT THE FORMS WERE IN FACT NOT "PROMPTLY" DELIVERED TO HIM, (2) WHY THE FORMS WERE NOT DELIVERED EARLIER, AND/OR (3) ANY PREJUDICE AT ALL, HE IS NOT ENTITLED TO A TOTAL DISCHARGE FOR AN ALLEGED ARTICLE III(c) VIOLATION.

For two reasons, petitioner is not entitled to any relief on this issue. First, he has not shown any Article III(c) violation. He relies on nothing but his own speculation that the prison system in fact did not "promptly" tell him about Michigan's detainer. Second, even if Article III(c) were violated, he is still not entitled to any relief. Whichever of the two approaches this Court takes,

because he has not even alleged any kind of prejudice whatsoever, he is not entitled to a total dismissal.

First, petitioner has not shown any Article III(c) violation. The burden of proving an IAD violation rests on the criminal defendant. Seymore v. Alabama, 846 F.2d 1355, 1360 (11th Cir. 1988). To discharge his burden, petitioner relies on nothing but his own speculation. He not only does not present any evidence, but has never presented any evidence even as to when the detainer was filed against him. This Court, of course, is not a fact finding court (especially in an appeal from a State conviction). The record is too incomplete to support petitioner's allegations. Of course, the IAD is not triggered until a detainer is actually lodged. Mauro, supra, 436 U.S. 361, 362.

In any event, petitioner has not shown, even if the detainer had been filed

as early as May 24, 1988, when he was sentenced in Allen County, Indiana, that he was not in fact "promptly" informed under III(c).[2] The record does not explain one way or the other why no one delivered the request to him until September 7, 1988. There could be good reasons; there could be bad reasons. After all, petitioner was not necessarily delivered to the Indiana Department of Corrections on the day of sentencing. He may have been in the Allen County jail for a while. Then, he may have been temporarily detained in the Indiana Reception and Diagnostic Center for a while. The record does not explain when petitioner even first arrived at the

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[2]Nothing before May 24, 1988, can possibly count. The IAD does not apply if the inmate is merely incarcerated in a jail awaiting sentence. United States v. Glasgow, 790 F.2d 446, 448 (6th Cir. 1985), cert. denied 475 U.S. 1124 (1986).

Westville Correctional Facility.[3] Further, why necessarily should the papers have been delivered to petitioner earlier? More logically, he should be given them once he is settled into the Department of Corrections system. Forcing each State's prison system to give these papers to inmates while they are still in reception centers would not be efficient. Mistakes, on everyone's part, occur when people are still in transit. The inmates themselves could lose their papers while being

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[3]If petitioner is willing, respondent will stipulate for purposes of this appeal to this Court that petitioner was transferred from the Allen County jail to the Indiana Reception and Diagnostic Center in Plainfield, Indiana, on July 19, 1988. He was then transferred to the Westville Correctional Facility on August 24, 1988.

transferred to their ultimate destination.

Second, even if Article III(c) is somehow violated, petitioner is still not entitled to any relief. He has not even alleged in the least any prejudice whatsoever. Discharge for such a violation (assuming that it even occurred) is too draconian. Neither line of cases in this country that has addressed this issue would call for a discharge.

As it is, the cases are split on whether or not a criminal defendant is entitled to any relief for an Article III(c) violation. Some of the cases note that the IAD fails to provide any remedy for an Article III(c) violation and thus have ruled that the inmate has no remedy. In Commonwealth v. Gonce, 320 Pa. Super. 19, 466 A.2d 1039, 1044 (1983), the Pennsylvania Superior Court stated:

> Notwithstanding our doubt that appellant was fully informed of

his rights, we do not agree that the Delaware prison officials' lapse dictates that the Pennsylvania charges be dismissed. The Detainers Agreement specifically provides for a remedy of dismissal of charges in three situations: (1) if trial is not commenced within the period prescribed in Art. III(a) and Art. IV(c) as specified by Art. V(c); (2) under Art. IV(e) where trial does not commence before the prisoner is returned to the sending state; and (3) when the refusing state fails or refuses to accept temporary custody under Art. V(c). Because the legislature chose to mention these specific situations when dismissal of charges is the appropriate relief, we will not generalize the relief and extend it to cover

possible procedural errors made by another state's prison officials. Accordingly, under the Detainers Agreement we will not dismiss the Commonwealth's charges against appellant.[2]

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[2]The appropriate vehicle for relief may be a civil lawsuit against Delaware prison officials. See Cuyler v. Adams, [449 U.S. 433 (1981)].

In Schin v. State, 744 S.W.2d 370 (Tex.App. 1988), the Texas Court of Appeals followed both Gonce and State v. Clark, 222 Kan. 65, 563 P.2d 1028 (1977), and stated:

> Inasmuch as the legislature chose to specify situations when dismissal is the appropriate remedy, the courts should not expand that relief to cover

possible procedural errors made by another state's prison officials. . . . . Moreover, we agree that "a legislative enactment providing for a speedy trial, with no sanction for failure to comply with the mandate, is generally construed as directory." Kansas v. Clark, 22 Kan. at 68-69, 563 P. 2d at 1032. Although we may sympathize with appellant, we find no authority in the statute to warrant dismissal of the Texas offenses. Accordingly, we hold that in this case, the IAD does not mandate dismissal of the Texas indictment for delays which occurred prior to Dallas County's receipt of appellant's request for speedy trial.

In addition, in State v. Reynolds, 218 Neb. 753, 359 N.W.2d 93 (1984), the

Nebraska Supreme Court stated, while construing a similar alleged IAD violation:

> The agreement does not require that the additional burden of proving that the sending state promptly complied with its provisions be placed on the receiving state, nor shall we. Under the particular facts of this case the request for temporary custody was in proper form and timely. No explanation appears in the record for the federal authorities' delay in responding to the Nebraska prosecutor's "request for custody." The prosecutors in this case are blameless and helpless, in view of the seeming disregard of the law by federal authorities.

> The agreement provides for the remedy of dismissal of charges with prejudice only in three specific cases, not including possible errors made by another party's prison officials. . . . Because the Legislature chose to mention specific situations when dismissal of charges is appropriate, we will not extend such relief for a custodial state's failure to promptly deliver a person to the receiving state pursuant to a proper request for custody.

As it is, as mentioned above, this Court need not decide whether this line of cases as opposed to the second line is correct. Under either line, petitioner is entitled to no relief. Under the second line of cases, dismissal is allowed in only

extraordinary circumstances State v. Smith, 686 S.W.2d 543 (Mo.App. 1985).[4] These cases require a case-by-case approach. State v. Barefield, 110 Wash.2d 728, 756 P.2d 731 (1988). No hard and fast rule is accepted. Coit v. State, 440 So.2d 409 (Fla.App. 1983). To a large extent, these cases invoke the balancing principles of this Court's decision in Barker v. Wingo, 407 U.S. 514 (1972). State v. Herring, 210 Conn. 78, 554 A.2d 686, 692 (1989), cert. denied 492 U.S. 912 (1989). In Herring,

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[4]Although at one time, Colorado had a rule pretty much mandating dismissal for an Article III(c) violation, Romans v. District Court, 633 P.2d 477 (Colo. 1981), it has since repudiated such an approach. People v Higginbotham, 712 P.2d 993 (Colo. 1986).

the Connecticut Supreme Court refused to afford the defendant any relief despite a six month delay. It found that the six month delay in New Jersey had occurred merely because of a backlog due to official intransigence. Then, it specifically noted that the defendant had not been prejudiced. 554 A.2d 692. He had neither shown that his conditions in New Jersey during this time had been adversely affected nor that he was hurt in any way in the delay in bringing his case to trial in Connecticut.

In the present case, petitioner has less to complain about than did the defendant in Herring. The delay in the present case was, at worse, less than four months. Further, petitioner does not even speculate in any way whatsoever that he was in any way prejudiced. He is claiming nothing more than the Act was some how violated so that this Court will then dismiss the conviction. He has not even

claimed (let alone shown) that his prison conditions in Indiana were any worse for him because of this "delay" (if one even occurred). Further, he has not even alleged that his defense was in any way damaged by any such "delay" while he was in Indiana. Last, he has never even alleged that he has been prejudiced in his sentence, somehow losing out on a concurrent sentence.[5] As petitioner has not even in the least even speculated on any kind of prejudice whatsoever, especially because the IAD provides for no remedy for an Article III(c) violation, he is not entitled to a dismissal (especially

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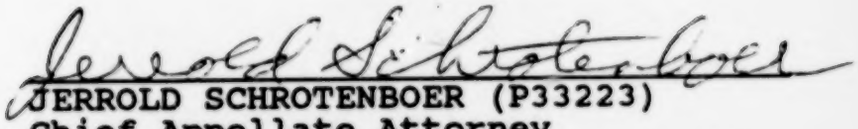
[5]Even if petitioner somehow was prejudiced on this last point, this Court could easily remedy the situation far short of dismissal by merely affording him extra credit for time served.

because the delay was at most, less than four months). No presently existing rule in this country supports such a draconian result. In fact, not a single court in the present case accepted it. Each considered the issue so insignificant that each did not even specifically explicitly address it.

Last, at the very least, should this Court in fact reverse, a discharge is not necessarily proper (at least yet). Respondent raised a waiver issue in the Michigan Supreme Court which was never addressed. By never demanding to be tried within 180 days, petitioner waived the IAD speedy trial provision. Williams v. State, 533 N.E.2d 1193 (Ind. 1989). If this Court should reverse, the proper procedure would be to remand back to the Michigan Supreme Court to consider the remaining issue.

WHEREFORE, respondent asks this Court to affirm.

Respectfully submitted,



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